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No. 00-1331

IN THE
Supreme Court of the United States

EDWARD GADSON, *et al.*,

Petitioners,

v.

SUSAN WALKER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners may relitigate the propriety of a 1997 final judgment that approved a nationwide class settlement by asserting, without evidentiary support, that they (a) failed to receive actual notice of the proposed class and settlement, (b) could not be bound because they were "future" members of the class, and (c) received inadequate representation?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

The parent company of Rhône-Poulenc Rorer Inc. is Aventis S.A. All subsidiaries of Rhône-Poulenc Rorer Inc. are wholly owned.

The parent company of Armour Pharmaceutical Company is Rhône-Poulenc Rorer Inc. All subsidiaries of Armour are wholly owned.

The parent company of Bayer Corporation is Bayer A.G. Onyx Pharmaceuticals, Inc., Millennium Pharmaceuticals, Inc., and Myriad Genetics, Inc. are non-wholly-owned subsidiaries of Bayer Corporation.

Baxter Healthcare Corporation's parent company is Baxter International, Inc. Baxter owns stock in certain publicly-traded companies and is filing this information under seal with the Clerk of the Court.

The parent company of Alpha Therapeutic Corporation is Green Cross International, Inc. Business Travel Specialists, Inc., G.C. Pharmaceutical (Singapore) Ptc Ltd., Grifols UK Ltd., and Grifols Italia SpA are non-wholly-owned subsidiaries of Alpha Therapeutic Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

The petition arises from the latest in a series of collateral attacks upon the 1997 final judgment that approved the factor concentrate class settlement. Pursuant to that judgment, respondent fractionators[1] have paid more than $620 million to hemophiliacs who claim that they contracted HIV from the plasma therapies used to treat their bleeding disorder and to the families of those hemophiliacs. The final judgment extinguished as to fractionators the tort claims of all class members who failed to opt out of the class and settlement. Pet. App. 42a ¶ 14.

[1] "Fractionation" is the process by which plasma is separated into its different components. Fractionators are Armour Pharmaceutical Co., Bayer Corp., Baxter Healthcare Corp., and Alpha Therapeutic Corp. Also named as a defendant is Rhône-Poulenc Rorer Inc., the indirect parent corporation of Armour.

Petitioners are class members who did not timely opt out of the class and settlement, but nevertheless persisted in suing fractionators in state court. The district court enjoined petitioners' state court lawsuits pursuant to the All Writs Act, 28 U.S.C. § 1651(a), Pet. App. 7a-8a, and the United States Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1a-3a. Petitioners now have asked this Court to grant certiorari to determine whether their due process rights are being violated.

Petitioners' arguments are not supported by either the evidentiary record or the law. Petitioners claim that they did not receive actual notice of the proposed class and settlement. However, one of the petitioners actually filed a timely claim for payment under the settlement, and the evidence strongly suggests that the other petitioners were aware of the proposed class and settlement. *See infra* at 8-9. The record also refutes petitioners' claim that they were "future" class members. *See infra* at 9-10. Petitioners fail to support their claim that the class was not represented adequately. *See infra* at 11-12.

Petitioners further contend that, as a matter of due process, they are entitled to relitigate the question of whether the class certified in 1997 met all the requirements of Rule 23. No court has abrogated the finality rule in this way. This Court has already declined to review this specific contention in petitions arising from two prior collateral attacks on the factor concentrate judgment. *See In re Factor VIII or IX Concentrate Blood Prod. Litig., Appeals of Spece, Ibañez, and Mull & Mull* and *In re Mull & Mull*, 159 F.3d 1016 (7th Cir. 1998) (Pet. App. 25a-32a), *cert. denied*, 526 U.S. 1081 (1999); *In re Factor VIII or IX Concentrate Blood Prod. Litig.*, 202 F.3d 273 (7th Cir. 1999) (Pet. App. 4a-6a), *cert. denied*, 529 U.S. 1033 (2000).

Finally, petitioners assert that the final judgment cannot bind class members who did not take the affirmative step of

opting into the class and settlement. Rule 23 was amended in 1966 to do away with the "spurious" class action rule advocated by petitioners. *See* Fed. R. Civ. P. 23 adv. comm. notes regarding 1966 amendment. No court has held that due process requires a return to the old procedure.

In short, there is nothing about the decision of the court of appeals that is remotely worthy of review. Petitioners' arguments are not supported by the evidentiary record. The decisions below do not conflict with the precedents of this or any other court. Moreover, the decisions below are factbound and correct. Accordingly, certiorari should be denied.

COUNTER STATEMENT OF THE CASE

1. Hemophilia is an incurable bleeding disorder caused by deficiencies of certain clotting factors in the blood. It is treated by administering the missing clotting factors to the patient. In the late 1960s and early 1970s, fractionators developed freeze-dried clotting factor concentrates derived from human plasma that dramatically improved the quality of life and life expectancy of persons with hemophilia.[2] However, the advent of the disease now known as AIDS had a tragic impact on persons with hemophilia. Before anyone knew that AIDS was transmissible by blood and plasma products, thousands of hemophiliacs were infected with the retrovirus now called HIV and known to be the cause of AIDS.[3]

2. Lawsuits were filed alleging almost 800 cases of HIV transmission through factor concentrates. In late 1993, all

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[2] Leon W. Hoyer, M.D., *Medical Progress: Hemophilia A*, 330 New Eng. J. Med. 38 (1994).

[3] Barbara L. Kroner, et al., *HIV-1 Infection Incidence Among Persons With Hemophilia in the United States and Western Europe 1978-1990*, 7 J. of Acquired Immune Deficiency Syndrome 279 (1994).

pending federal factor concentrate cases were consolidated in the Northern District of Illinois before Judge John F. Grady. *In re Factor VIII or IX Concentrate Blood Prod. Litig. (MDL-986)*, 853 F. Supp. 454, 456 (J.P.M.L. 1993). In 1994, the district court certified a nationwide "issue" class for the purpose of determining in a single trial whether fractionators were "guilty of ordinary negligence." *Wadleigh* v. *Rhône-Poulenc Rorer Inc.*, 157 F.R.D. 410, 426 (N.D. Ill. 1994). The court of appeals subsequently issued a writ of mandamus ordering the district court to decertify the class. *Matter of Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). This Court denied certiorari, 516 U.S. 867 (1995), and the class was decertified.

3. Fractionators and the Plaintiffs' Steering Committee subsequently negotiated a class settlement in which fractionators agreed, *inter alia*, to pay $100,000 for each approved claim. Pet. App. 52a-67a.[4] On August 14, 1996, the district court conditionally certified a Rule 23(b)(3) settlement class in the case of *Walker* v. *Bayer Corp.*, No. 96-C-5024 (N.D. Ill. 1996) and authorized issuance of class notice. FA271.[5] In accordance with Rule 23(c)(2), the notice expressly advised class members that, in order to preserve the right to pursue individual litigation against fractionators, they had to opt out of the class by October 15, 1996. Pet. App. 63a.

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[4] In addition, fractionators paid more than $30 million to resolve federal and state Medicare and Medicaid claims as well as the claims of most private health insurers, so that claimants would receive the settlement payments free and clear of most outstanding claims. Pet. App. 46a ¶ 10(E)(2); 50a; 61a-62a. Fractionators also established a separate $40 million fund as the exclusive source from which the district court would later award all costs and attorneys' fees. Pet. App. 50a ¶ 18.

[5] Fractionators have lodged with the Clerk of the Court copies of fractionators' appendix to their brief in the court of appeals ("FA").

Individual notice was provided to all identified members of the class. FA275 ¶¶ 6-8. The National Hemophilia Foundation mailed the notice to each individual and organization on its mailing list. FA275 ¶ 9. Additional copies of the notice were provided to other hemophilia membership groups. FA276 ¶¶ 10-11. Summary notice was published in a national newspaper on three dates. FA276-77 ¶ 13. *See also* FA280. News releases and Internet postings provided additional notice of the settlement. FA277 ¶¶ 14-15. In addition, the class settlement drew substantial media attention. FA281-324.

The district court specifically found that the plan of notice "fully and accurately informed the [s]ettlement [c]lass [m]embers of all relevant and material elements of the proposed [s]ettlement [a]greement and afforded them an adequate time to decide whether to opt out of the settlement." Pet. App. 39a ¶¶ 5-6. The district court further found that the notice "constituted the best notice practicable under the circumstances, that the notice constituted valid, due and sufficient notice to all [s]ettlement [c]lass [m]embers, and that the notice given was in such manner as directed by the court and in full accordance with Rule 23 of the Federal Rules of Civil Procedure." *Id.* ¶ 7.

4. After two fairness hearings, the district court entered final judgment on May 8, 1997, certifying the class and finally approving the settlement. Pet. App. 35a-51a. The final *Walker* judgment expressly barred claims against fractionators by class members who had not filed timely opt-outs. *Id.* at 49a ¶ 14. In a subsequent order, the district court held that class members could seek to opt out on an untimely basis if they could establish extraordinary circumstances supporting their request. *Id.* at 33a-34a. Two appeals of the final factor concentrate judgment were dismissed voluntarily pursuant to settlements. *Dowling* v. *Alpha Therapeutic Corp.*, No. 97-2410 (7th Cir., appeal dismissed July 16, 1997); *Otis*

v. *Bayer Corp.*, No. 97-2556 (7th Cir., appeal dismissed July 24, 1997). Fractionators began the process of paying class members.

5. Certain attorneys then collaterally attacked the judgment in an attempt to obtain fees in addition to those provided under the settlement agreement. Those attorneys argued, among other things, that the judgment violated due process and conflicted with this Court's decision in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). The district court rejected the attorneys' collateral attack upon its judgment, FA350-52, and the court of appeals affirmed. *In re Factor VIII or IX Concentrate Blood Prods. Litig., Appeals of Spece, Ibañez and Mull & Mull* and *In re Mull & Mull ("Spece & Mull")*, 159 F.3d 1016 (7th Cir. 1998) (Pet. App. 25a-32a). This Court denied certiorari. 526 U.S 1081 (1999).

6. A second collateral attack was then filed by certain class members who initially had filed timely claim forms but then filed or sought to reactivate their state court lawsuits against fractionators. The district court denied the class members' Rule 60(b) motions and granted fractionators' motion to enjoin the state court lawsuits. Pet. App. 11a-24a. Once again, the district court rejected arguments that its final judgment was void under *Amchem*, 521 U.S. 591, and failed to comply with the requirements of Rule 23. App. 11a-12a, 20a, 22a. The court of appeals affirmed in an unpublished order. *In re Factor VIII or IX Concentrate Blood Prods. Litig., Appeal of Tallakson*, 202 F.3d 273 (7th Cir. 1999) (Pet. App. 4a-6a). This Court again denied certiorari. 529 U.S. 1033 (2000).

7. The present petitioners nevertheless pursued individual lawsuits against fractionators in state court.[6] On

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[6] Two other class members represented by the same counsel also pursued individual litigation against fractionators. Those class members

June 1, 1999, fractionators moved to enjoin those lawsuits. FA374. Petitioners opposed the motion but provided no evidence to support their claim that they failed to receive actual notice of the class settlement. *See* Pet. App. 2a-3a.

Before the district court ruled upon the pending injunction motion, petitioners filed a preemptive petition for writ of mandamus in the court of appeals. After that court denied mandamus, FA389-90, the district court enjoined petitioners from pursuing individual state court lawsuits against fractionators. Pet. App. 7a-8a. The district court explicitly relied upon its previous orders that (1) set forth the procedures for opting out of the class on an untimely basis; (2) enjoined similarly situated class members from pursuing individual state court lawsuits; and (3) denied similarly situated class members' motions for relief from the district court's final order and judgment approving the class settlement. *Id.*

8. The court of appeals affirmed in an unpublished order that relied on its opinions in the prior collateral attacks. Pet. App. 2a-3a. The court observed that one of the present petitioners is "identically situated to the claimants whose appeals we rejected in our October 7, 1999, order. The other four claim not to have received notice of the proposed settlement, but the district court with ample basis rejected the claim as factually unfounded." *Id.* The court of appeals held that the class settlement "was not void and could not be collaterally attacked," emphasizing the court's prior holding that "[a]fter a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge." *In re Factor*

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were subject to the proceedings in the district court and court of appeals, but have not joined the present petition.

VIII or IX Concentrate Blood Prods. Litig., Appeal of Gadson, 234 F.3d 1273 (7th Cir. 2000) (citing 159 F.3d at 1019) (Pet. App. 2a). Petitioners then sought review by this Court.

REASONS THE PETITION SHOULD BE DENIED

Fractionators entered the costly factor concentrate class settlement to reduce to a small and defined group the persons who could pursue individual tort litigation against fractionators. Petitioners did not opt out of the class on a timely basis. Accordingly, their claims against fractionators were extinguished by the final judgment that approved the class and settlement.

Petitioners' challenge to that judgment is based upon unsupported statements by petitioners' counsel. In many instances, those assertions are contradicted by the evidence before the district court. The district court and court of appeals concluded that petitioners had not established a factual predicate for their due process arguments. Those determinations are correct, factbound, and do not conflict with the precedents of this or any other court.

Indeed, petitioners' legal arguments run contrary to decades of due process, finality, and class certification law. Even if this Court were inclined to revisit those issues, the present case would not provide an appropriate vehicle. Accordingly, the petition should be denied.

I. Petitioners first complain that it is improper to bind class members who did not receive actual notice of the settlement. Pet. 7-10. This issue is not presented on the record. One petitioner, Victoria Governali, actually filed four timely claim forms on behalf of her minor nephew, Robert P. Burlingame, for the deaths of his parents, Robert M. and

Frances Burlingame. FA1-104.[7] The other petitioners – Edward Gadson, Lisa Simonelli, and Khemwatie Ramnauth (on behalf of her minor son Richard Katwaru) – presented no evidence other than their counsel's unsupported argument that they did not have actual notice of the settlement. Indeed, the record before the Court supports the inference that these petitioners were aware of the proposed class and settlement.[8] The Seventh Circuit, noting that "the district court with ample basis rejected the claim [of lack of notice] as factually unfounded," unremarkably held that the district court did not abuse its discretion in concluding that these petitioners were not entitled to back out of the settlement. Pet. App. 2a-3a.

II. Petitioners assert, without evidentiary support, that they cannot be bound by the judgment because they are "future class members," as that term is used in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). However, the record establishes that all of the HIV infections at issue occurred long before the deadline for opting out of the *Walker* class. FA394-95 ¶¶ 14-16; FA417 ¶¶ 8-11; FA425 ¶¶ 14-16; FA437 ¶¶ 10-13; FA444 ¶¶ 9-11; FA452 ¶¶ 9-12. Indeed, all

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[7] Governali represented in those claim forms that she had legal authority to participate in the settlement on her nephew's behalf. FA1, FA4, FA39, FA44, FA56, FA83. She later attempted to repudiate the claim forms by asserting, without evidentiary support, that she was not appointed guardian and estate representative until a later date. Governali's disingenuous argument does not change the fact that she had actual notice of the proposed class and settlement and that no one filed a timely opt-out form for her nephew.

[8] The record establishes that: (1) claims were filed on behalf of both of Gadson's HIV-positive hemophiliac uncles, with whom he had a close relationship, FA144, FA193, FA213-18; (2) Simonelli's former husband, through whom she claims to have been infected, filed a claim form and was paid under the settlement, FA444-45, ¶¶ 9, 17-18; and (3) Ramnauth, acting on behalf of her son, asked for and was sent a claim form which was never returned, FA266. The record also contains the detailed plan of class notice. *See* FA276-77. Petitioners have never challenged the constitutional adequacy of that plan.

but one petitioner admitted that they were aware of their HIV status long before notice issued. FA1, FA144, FA193, FA265.

The remaining petitioner, Edward Gadson, is not a "future" class member because, as both of the lower courts recognized, he had long possessed information that would put any reasonable person on notice that he likely was HIV positive. Gadson's decision not to be tested for HIV until after the opt-out date, when doctors not only diagnosed him with HIV but also with "full-blown AIDS," FA213, FA219-23, was one wholly within his own control and does not entitle him to avoid the factor concentrate judgment. Petitioner could have preserved his option of later filing an individual lawsuit, while still avoiding finding out about his HIV status, simply by opting out of the class timely.

On this record, there is nothing extraordinary about the court of appeals' decision that the district court acted within its discretion in concluding that the petitioners are bound by the final judgment.

III. Petitioners also argue that the final judgment cannot bind them because the class was inadequately represented. Pet. 11-12. However, in approving the class and settlement, the district court specifically found that the factor concentrate litigation had been contested vigorously, that class members faced significant problems in proving their claims, and that the class settlement was widely supported by class members. Pet. App. 42a-49a. Petitioners' conclusory assertion that the settlement was not large enough, Pet. 24, is inherently factbound and does not warrant this Court's review.

IV. Petitioners next argue that class members are entitled, as a matter of due process, to relitigate on collateral attack whether a finally-certified class conforms to each of the requirements of Rule 23(a) and (b). More specifically, petitioners complain that, because the final factor concentrate

judgment was not reviewed on direct appeal, "[t]here has never been an examination as to whether the settlement-only class was properly or improperly certified under subdivisions (a) and (b) of Rule 23." *See* Pet. 3.

However, in certifying the class, the district court concluded that the class met the requirements of Rule 23. Pet. App. 48a-49a. In rejecting the collateral attacks on the factor concentrate class settlement, the district court reiterated that the class complied with Rule 23. FA350-52; Pet. App. 13a, 20a, 7a. The Seventh Circuit has consistently ruled that the district court had jurisdiction to certify the class and that its judgment may not be second-guessed on collateral attack. Pet. App. 28a-29a, 6a, 3a.[9] This Court has already twice declined to review the issue. 526 U.S. 1081; 529 U.S. 1033.

There simply is no authority for the proposition that class members who received constitutionally adequate notice and representation may perpetually dispute whether a finally-certified class met the requirements of Rule 23. Rather, as the Seventh Circuit has held repeatedly in this litigation, allowing such far-reaching collateral attacks would violate the principle of finality. Pet. App. 28a-29a, 6a, 3a. These holdings are wholly consistent with this Court's judgment in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997), which addressed issues of class representation and superiority on a direct appeal.[10]

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[9] The court has questioned the structure of the settlement, but concluded that such musings after entry of a final judgment do not provide a basis for a collateral attack. Pet. App. 27a-28a, 3a.

[10] Petitioners claim, erroneously, that the lower courts' decisions directly contradict Seventh Circuit case law, citing *Tice* v. *American Airlines*, 162 F.3d 966 (7th Cir. 1998). In *Tice*, pilots challenged American Airlines' policy that flight officer positions could not be filled by a pilot who had reached retirement age. American had successfully defended that policy twice before in two "group" employment actions on

V. Finally, petitioners contend that the class notice worked a forfeiture because it stated that all class members who failed timely to opt out of the settlement would be bound by the final judgment. Pet. 24-30. Both of the lower courts rejected this argument out of hand because the very element of notice that petitioners assert is unconstitutional is in fact required both by Rule 23(c)(2) and due process.

The constitutionally required elements of notice are: (a) the court will exclude any class member who opts out timely; (b) the judgment will bind all class members who do not opt out; and (c) class members who do not opt out can appear through counsel. Fed. R. Civ. P. 23(c)(2); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Petitioners do not dispute that the class notice contained all of those elements. *See* Pet. App. 63a (class members notified that the court would exclude any member who opted out timely); Pet. App. 64a (class members were notified that the judgment would bind all class members who did not opt out timely, or who

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different grounds from those brought by the *Tice* plaintiffs, and from which the *Tice* plaintiffs had been specifically excluded. The Seventh Circuit held that the previous lawsuits, to which the *Tice* plaintiffs were not parties, did not bar their suit.

Tice is completely irrelevant to, and does not contradict, the decision below. Here, not only did the district court certify a class of which each petitioner is a member, but each of petitioners' claims against the fractionators is expressly barred by the factor concentrate judgment.

Petitioners' further reliance upon *Epstein* v. *MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), *opinion withdrawn and superseded by Epstein* v. *MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), is also misplaced. They cite to a 1997 panel opinion that was later withdrawn. The Ninth Circuit ultimately held that class members do not have a broad right to challenge collaterally the adequacy of representation if the certifying court makes a determination of the adequacy of representation in accordance with this Court's precedent. 179 F.3d at 648 (discussing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985)). That holding is entirely consistent with the decisions by the lower courts in this case.

neither opted in nor out); Pet App. App. 64a (class members could appear through counsel).

It has long been recognized that the due process requirements of Rule 23(c)(2) are constitutionally required, and that notice that complies with Rule 23(c)(2) – as the lower courts held this one did – is constitutionally sufficient. *See Phillips Petroleum Co.*, 472 U.S. at 812; *Carlisle & Jacquelin*, 417 U.S. at 173; *Mullane* v. *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Petitioners' collateral attempts to rewrite the law of notice should be rejected.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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